IN THE

Supreme Court of the United States

October Term, 1978

No. 78-200

RICHARD TIMOTHY WORKMAN,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of California.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Petition for a Writ of Certiorari to the Supreme Court of California.

Opinion Below.

The opinion of the Court of Appeals was unpublished in accordance with the California Rules of Court. A copy of the opinion is attached in our Appendix (App. "A").

On July 5, 1978, a timely petition for hearing was denied by the Supreme Court of California (App. "B").

Jurisdiction.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257.

Questions Presented.

1. Whether the unconsented review of a presentence report at the pre-trial stage by the state court trial judge violated due process of law.

2. Whether petitioner's presence was constitutionally required at a pre-trial in-chambers plea negotiation during which highly prejudicial information was received.

Statement.

A. Trial Proceedings.

After a jury trial in the Superior Court of the State of California, petitioner, and co-defendant, William Cole, were convicted on eight counts of a fifteen count Information charging unlawful conduct regarding four counterfeit cashier's checks.[1]

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[1]Count I charged Workman, Maida and Cole with a conspiracy to cheat and defraud The Bank of Finance, The Bank of Tokyo, The First National Bank and one Russell Woolley, and obtaining money and property by forging, making or uttering false checks with knowledge of the falsity in violation of §182.4 of the California Penal Code (R. 1-2).

Counts II, III, IV and V charged each defendant with forging and uttering cashier's checks in the amount of $19,370.-00, $24,500.00, $38,650.00 and $9,379.00, respectively, with intent to defraud The Bank of Finance, The Bank of Tokyo, The First National Bank, and one Russell Woolley, respectively, in violation of California Penal Code §470 (R. 2-3).

Count VI charged each defendant with possession of a forged cashier's check of The Bank of Finance with intent to cause the utterance of such check to defraud Russell Woolley and The Bank of Finance in violation of California Penal Code §470 (R. 3).

Count VII charged each defendant with grand theft by taking the property of The Bank of Finance, The Bank of Tokyo and The First National Bank, in violation of California Penal Code §§484-487.1 (R. 3-4).

Count VIII charged each defendant with grand theft by taking the personal property of Russell Woolley in violation of California Penal Code §§484-487.1.

Counts IX, X, XI and XII charged each defendant with possession of the completed forged cashier's checks charged in Counts II, III, IV and V with intent to defraud in violation of California Penal Code §475(a).

Counts XIII, XIV and XV charged each defendant with possession of forged cashier's checks of The Bank of Finance, The Bank of Tokyo and The First National Bank, respectively, with intent to defraud in violation of California Penal Code §475.

Upon conviction of forgery as charged in Counts II, III, IV and V, the jury was instructed not to return a verdict as to Counts VI, IX, X, XI, XII, XIII, XIV and XV, which charged the included offense of possessing the checks with intent to defraud (R. 109).

[2]"R.T." is a reference to the Reporter's Transcript. "R" will be used as a reference to the Clerk's Record.

The instant case was a peculiar one which involved four counterfeit cashier's checks totaling $19,370.00, $24,500.00, $38,650.00 and $9,379.00, the former three of which were deposited in late March and early April, 1976, to the checking account of Country Cadillac, an automobile dealership in South Gate, California, of which petitioner was the manager. The owner of Country Cadillac, Samuel Maida, was acquitted on all 15 counts.

Apparently, similar counterfeit checks had appeared in the area since 1974 (R.T. 346-364).[2] There is no suggestion, even implicitly, that petitioner or indeed that any defendant had any prior association with any of the checks.

The fourth check ($9,379.00), drawn on The Bank of Finance was made payable to one Angelo Quintiliani, and negotiated by petitioner and Cole to one Russell Woolley, an automobile wholesaler who had done business with all three defendants for many years (R.T. 144). The check was used to purchase a Cadillac for $5,750.00. The balance of $3,629.00 was paid by check to Cole (R.T. 154). When Woolley later learned of the fictitious nature of the check, he discussed the matter with petitioner who advised him that he had learned that he had received several bad checks for the flooring of automobiles (R.T. 155).

On April 1, 1977, petitioner was sentenced on Count I to imprisonment in the state penetentiary for not less than ten years as prescribed by law. Sentences of 1 to 14 and 1 to 10 were imposed on Counts II, III, IV and V (forgery) and VII and VIII (grand theft), all sentences to run concurrently (R. 139-140).

One reason underlying our characterization of the instant case as "peculiar" is our view that any objective review of the record reveals that the state vouched for the credibility of two witnesses who were plainly perjurers as to critical facts. Moreover, the record demonstrates that upon learning of the fictitious nature of the checks, the defendants contacted several law enforcement agencies, including the Federal Bureau of Investigation, to initiate an investigation.

Much of the state's evidence was undisputed. There was no contradiction that the counterfeit checks were deposited to Country Cadillac's account and the credit thereby obtained used in part. The critical dispute focused on petitioner's knowledge *vel non* of the fictitious nature of the checks.

Petitioner contended from the outset that he had received the checks from two individuals who provided the money to floor automobiles. Petitioner further contended that his attorney had prepared a flooring agreement pursuant to receipt of the checks. Petitioner's recitation that two individuals had come to the office of Country Cadillac on many occasions with respect to arranging flooring was corroborated by several Country Cadillac employees and others (R.T. 683-686, 727,

759-760, 762-765). The two individuals were called by the state and denied providing the checks or engaging in the flooring discussions; rather, they claimed that they had continually come to the Country Cadillac lot for the purpose of purchasing an automobile (R.T. 480-496, 533-538).

B. The Pre-Trial In-Chambers Conference.

In the instant case, prior to trial, an in-chambers discussion occurred in the presence of the prosecutor, trial judge, co-defendant's counsel and petitioner's counsel.[3]

The factual context of this in-chambers discussion is relevant to both issues we posit on this petition.

Prior to jury selection, the prosecutor erroneously advised the court that "[t]here was a pre-plea report done at the request of the defendant some weeks ago." (R.T. 4).[4] The prosecutor volunteered that "the probation officer came back with a recommendation of state prison for all three defendants" and that "we feel it's a state prison case because of their past records. The probation officer agreed as to all three and that's basically where we are. I could only take a plea straight to state prison." (R.T. 4).

When the court inquired whether restitution was in order, the prosecutor replied that "restitution, par-

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[3]Petitioner's counsel also jointly represented co-defendant Samuel Maida who was acquitted on all counts.

[4]This was a mistaken representation. In fact, the request was made by co-defendant Cole's attorney, appearing in petitioner's attorney's absence. Petitioner, however, did not consent to the preparation of the report (Hearing, January 19, 1977).

ticularly with respect to Mr. Workman would not affect our decision, because he is undoubtedly the heavy and we feel to protect the public, if nothing else, we want to put him in state prison." (R.T. 11).

The prosecutor then advised the court (R.T. 15):

> "For a little background, Mr. Workman is non-licensable by the DMV and apparently he works behind Mr. Maida's license, but we have reason to believe that everybody involved with Mr. Workman is very heavy and apparently has a—he apparently conducts a reign of terror with his associates, but apparently he does have Mr. Maida very much under his influence, it is our impression."

The Deputy District Attorney urged that she believed the defendants were "state prison candidates and it's time they went" (R.T. 22) and that her office strongly felt that petitioner had "exhausted the patience of the citizens and it's time [he] went to state prison" (R.T. 23).

During the negotiations, counsel for co-defendant Cole advised the court that Cole contended (and would so testify) that at the time Cole handled the checks, he did not believe they represented legitimate money *and that he so advised petitioner* (R.T. 32, 35, 47). Cole's effort to enter a guilty plea subsequently aborted. Cole never testified in his own defense at trial; thus, petitioner was never afforded the opportunity to cross-examine this highly prejudicial statement proffered to the court outside his presence.

Petitioner's counsel, who jointly represented petitioner and Maida, explained to the court that essentially

Maida was not involved in the transaction (R.T. 11). He also told the court that petitioner had been convicted of two counts of being an unlicensed salesman for Maida and was sentenced to serve six month consecutive sentences, and that petitioner would plead guilty if he could receive a similar sentence (R.T. 14).

Petitioner's counsel also advised the court that petitioner faced felony charges of grand theft in Norwalk as a result of this transaction (R.T. 14). When the court suggested that counsel speak to petitioner about the people's offer to dismiss remaining counts in return for petitioner's accepting state penitentiary time, counsel responded that "I don't think it's the counts as much as the time factor. How much time is involved. If we could possibly get some kind of commitment as to max time, I think we could get some movement" (R.T. 16).

Later, counsel reported to all concerned that "we are hung up as you can imagine on Mr. Workman's situation. He expressed an interest in something about a year, along the lines of one or two counts and restitution which he's indicated always he was willing to make . . ." (R.T. 20; see also R.T. 25, 30-32).

ARGUMENT.

I

The Unconsented Review of a Presentence Report at the Pre-Trial Stages by the State Court Trial Judge Violated Due Process of Law and Mandates Reversal.

In our view, this in-chambers conference created error of constitutional magnitude on two grounds. First, the consideration by the court of a pre-plea presentence report, without the consent of the accused, violated due process. Secondly, as we argue in Part II *infra*, the very existence of this conference, outside the presence of the accused, occurred at a critical stage of the proceedings where his presence was required, and thus similarly requires reversal in order to effectuate the guarantee of due process.

California Penal Code §1204.5 provides in pertinent part:

> "In any criminal action, after the filing of any complaint or other accusatory pleading and before a plea finding or verdict of guilty, no judge of any court shall read or consider . . . any information reflecting the arrest or conviction record of a defendant . . . or any . . . representation of any kind, verbal or written, except as provided in the rules of evidence applicable at trial, or with the consent of the accused given in open court."

§1204.5 thus parallels in pertinent part the analogous Rule 32(c)(1) of the Federal Rules of Criminal Procedure, which insofar as relevant, provides:

> "(c) Presentence Investigation.
>
> (1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.
>
> *The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a Judge may, with the written consent of the defendant, inspect a presentence report at any time.*" [Emphasis added.]

Rule 32(c)(1)'s mandate that the presentence report shall not be submitted to the court prior to a finding or plea of guilty thus parallels §1204.5's similar proscription.

The effect of the mandatory language of the federal rule was considered by this Court in *Gregg v. United States*, 394 U.S. 490 (1969). The Court emphasized the seriousness of any violation of the rule's express terms (394 U.S. at 491-492):

> "Rule 32 is explicit. It asserts that the 'report shall not be submitted to the court * * * unless the defendant has pleaded guilty or has been found guilty.' This language clearly permits the preparation of a presentence report before guilty plea

> or conviction [citation omitted] but it is equally clear that the report may not, under any circumstances, be submitted to the court before the defendant pleads guilty or is convicted. Submission of the report to the court before that point constitutes error of the clearest kind."[5]

The Court emphasized that the "rule must not be taken lightly" (*id.* at 492) and concluded that the submission of the type of material generally contained within presentence reports "to the judge who will pronounce the defendant's guilt or innocence *or who will preside over a jury trial* would seriously contravene the rule's purpose of preventing possible prejudice from premature submission of the presentence report" (*ibid.*) (emphasis supplied).

The Court thus stressed the serious potential for harm even where the court to whom the report was submitted is not the arbiter of guilt, but rather is only to preside over a jury trial. The Court even noted that a judge could not properly examine a presentence report "while the jury is deliberating since he may be called upon to give further instructions or answer inquiries from the jury, in which event there would be the possibility of prejudice which Rule 32 intended to avoid."

While the Court did not reverse the conviction in *Gregg*, its determination stemmed from the "very special circumstances appearing in this case." (*Id.* at 492). It drew upon the fact that the record did not reveal that the court had in fact read the presentence report and that in any event even if the record revealed

[5]The Court's conclusion that the report could not be submitted to the court prior to a finding of guilt *under the circumstances* preceded the 1974 Amendment to the Rule, which allows such submission, but only upon the "written consent of the defendant."

that the judge had read the presentence report after the jury retired and before the return of the verdict, the judge could not have infected the jury with anything he learned from the report since there was no necessity or occasion for communicating with the jury once it began its deliberations, and the jury delivered its verdict immediately upon emerging from seclusion (*ibid.*).

The underpinning of *Gregg* is powerfully persuasive toward resolution of the issue present here. The recognition that there is extreme danger of prejudice from such perusal of improper materials even in a jury trial where the court is not the arbiter of guilt is an important concept. This Court emphasized the potential for prejudice even when the court first reads the materials during jury deliberations, noting the potential for prejudice if the court were required to answer inquiries from the jury.

Gregg thus implicitly establishes a rule of *per se* reversal for violations of the federal rule which parallels §1204.5. For due process purposes, there is no sound reason to distinguish between the federal rule and its state counterpart. *Gregg's* progeny support our view that the error attendant to violations of statutory equivalents of §1204.5 is reversible *per se* and indeed rises to constitutional proportions.

Thus, in *United States v. Park*, 521 F.2d 1381, 1383, n. 1 (1975), the United States Court of Appeals for the Ninth Circuit flatly rejected the government's argument that violations of Rule 32 could be assessed by traditional "harmless error" standards. The Court concluded that the government's "protestations of harmless error are of no avail." As the Court stressed *(ibid.)*:

> "Because of the Supreme Court's strong language in *Gregg*, we hold that violations of Rule 32 are *per se* reversible. For that reason, we do not reach the issue of harmless error in this case."

The philosophy of *Gregg* and *Park* was reiterated in *United States v. Montecalvo,* 533 F.2d 1110 (9th Cir. 1976). *Montecalvo* reflects that the predicate for Rule 32 is not only to eliminate actual unfairness, but also to obviate another element that is of equal importance in our hierarchy of values—the appearance of unfairness. The Court cogently observed (*id.* at 1112):

> "The purpose of Rule 32(c)(1) is to prevent, so far as possible, the injection into the guilt or innocence phase of the trial various kinds of information that would not be admissible as evidence to determine innocence or guilt and that could affect the fairness of that determination. Rule 32(c)(1) is another example of the means that we use to try to avoid convicting or appearing to convict a defendant for being a bad person instead of convicting him solely for committing the crime for which he has been charged. The appearance of fairness is as important as fairness-in-fact in maintaining confidence in the administration of justice in the minds of the public and of the accused. Under Rule 32(c)(1), it is immaterial whether any judge can or has totally disregarded prejudicial information in a presentence report that he has read before the conclusion of the guilt phase of the trial. The Rule is a preventive device to avoid any appearance of unfairness."

On rehearing, the earlier opinion was vacated and the conviction was affirmed. *United States v. Montecalvo,* 545 F.2d 684 (9th Cir. 1976). While the Court adhered to the *per se* reversible error rule of *Park, supra,* the Court nevertheless concluded that the error was "invited" by defense counsel who requested the trial court to read the presentence report in connection with a guilty plea which later aborted. We stress, however, that the trial court's action in *Montecalvo* preceded the amendment to Rule 32 which now requires "the written consent" of the defendant in order to effectuate a waiver of the rule's protections. Similarly, §1204.5 affords coterminous protection in requiring "consent of the accused given in open court . . ." Manifestly, the doctrine of "invited error" is no longer available in the federal system to circumvent application of the *per se* reversal rule enunciated in *Park.* The mandate of Rule 32 is explicit. It is simply reversible error for a federal trial judge to read a presentence report at any time before a verdict is reached in a criminal case without first obtaining the written consent of the accused. *Government of Virgin Islands v. Richardson,* 498 F.2d 892, 895, n. 4 (3rd Cir. 1974); see also *United States v. Ramirez,* 513 F.2d 72 (5th Cir. 1975).

The implicit recognition of *Gregg* is that Rule 32 is designed to prevent even the appearance of unfairness. *Gregg* emphasizes that "Rule 32's prohibition is aimed not merely at preventing prejudice to the defendant, but preventing even the possibility of prejudice". *United States v. Small,* 472 F.2d 818 (3rd Cir. 1972). These recognitions are equally applicable and persuasive in appraising violations of §1204.5. There can be no

sound reason to conclude that a state court be permitted to violate such significant rights.

The court below seriously erred in concluding that the conceded §1204.5 violation was not reversible since the court concluded that petitioner was not prejudiced.

An argument that actual prejudice must be demonstrated in order to cause reversal cannot properly be sanctioned. To require a demonstration of actual prejudice would render the protection wholly illusory. It would thus require a defendant to demonstrate the same qualitative and quantitative prejudice that would be necessary even in the absence of the rule. Despite the fact that the rule has equal efficacy in both jury and non-jury trials, in a jury trial it would approach the impossible to demonstrate that the court's consideration of improper information was transmitted to the jury and actually infected the verdict. If such a quantitative showing were demonstrated, the defendant would be protected even absent §1204.5. Prejudicial misconduct by the court has traditionally been an independent ground for reversal, both in California as well as the federal system. *People v. Hooper,* 92 Cal. App. 2d 524, 207 P.2d 117 (1949); *People v. Robinson,* 179 Cal. App. 2d 624, 4 Cal. Rptr. 50 (1960).

We believe our reasoning to be compelling. If the rule prohibiting a court from receiving such material has any efficacy, there must necessarily be a means for enforcing it; thus, a sanction for its violation. If prejudice is required to be demonstrated, the protection of §1204.5 evaporates and becomes a right without meaning. In our view, due process provides more than a transparent right.

The court below cavalierly rejected our argument, concluding that the information was the same type

of information that any court could have become aware of on an application for bail. The court, however, failed to focus on the nature of the information actually received by the court which included the pre-trial reading of the presentence report, which is assuredly material that is plainly protected from early disclosure. The appellate court failed to focus on this aspect and indeed, did not deal at all with the federal cases under Rule 32(c). Plainly, in the federal system, the courts would not sanction a Rule 32(c) violation by simply concluding, as did the court below, that the same type of information would have been available at a bail hearing. There is no sound reason to sanction such an approach in a state system.

The crucial predicate of the state rule and its federal corollary is the assurance that improper influences are absent from criminal trials. The proper administration of our criminal justice system requires that a criminal trial be sanitized from even the appearance of impropriety. The appearance of impropriety alone rises to due process proportions. *Mitchell v. Sirica,* 502 F.2d 375 (D.C. Cir. 1974). See also *Comm. Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145, 150 (1968).

In the instant case, the proceedings were infected with the appearance of impropriety. A layman would necessarily question the propriety of a judge presiding impartially after reading a presentence report detailing the past activities of a defendant, and drawing conclusions pertaining to sentencing, including all factors pertinent thereto.

II

Petitioner's Conviction Must Be Reversed Due to the Trial Court's Failure to Secure Petitioner's Presence at the Pre-Trial In-Chambers Conference Regarding Plea Negotiations.

This Court should grant a Writ of Certiorari to consider a question of grave importance to the state courts throughout the Nation. In our view, the in-chambers conference, conducted in the accused's absence, ran afoul of important notions of due process. There is the manifest appearance of impropriety where a court, *in the absence of a defendant and without his consent,* reads a pre-plea presentence report, hears from the defendant's own attorney that the defendant would plead guilty if he could avoid imprisonment in the state penitentiary, hears from a co-defendant's counsel the unsworn and uncross-examined assertion that the co-defendant claimed to have advised the defendant that the checks in issue were improper, and hears strong statements by the prosecutor about the defendant's alleged activities and "reign of terror."

This practice is plainly not permissible in federal practice. The 1974 Amendment to Rule 11, Federal Rules of Criminal Procedure, provides in pertinent part:

"(e) Plea Agreement Procedure.

(1) *In General.* The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions."

This prohibition against the court participating in plea discussions is consonant with modern legal principles. See ABA Standards Relating to Pleas of Guilty, §3.3(a) (Approved Draft, 1968). The Notes of the Advisory Committee on Rules cogently recognizes the due process implications:

"There are valid reasons for a judge to avoid involvement in plea discussions. It might lead the defendant to believe that he would not receive a fair trial, were there a trial before the same judge. The risk of not going along with the disposition apparently desired by the judge might induce the defendant to plead guilty, even if innocent. Such involvement makes it difficult for a judge to objectively assess the voluntariness of the plea. See ABA Standards Relating to Pleas of Guilty § 3.3(a), Commentary at 72-74 (Approved Draft, 1968); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 891-892 (1964); Comment, Official Inducements to Plead Guilty: Suggested Morals for a Marketplace, 32 U.Chi.L.Rev. 167, 180-183 (1964); Informal Opinion No. 779 ABA

Professional Ethics Committee ('A judge should not be a party to advance arrangements for the determination of sentence, whether as a result of a guilty plea or a finding of guilt based on proof.'), 51 A.B.A.J. 444 (1965). As has been recently pointed out:

> The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. United States ex rel. Elksnis v. Gilligan, 256 F.Supp. 244, 254 (S.D.N.Y. 1966).

On the other hand, one commentator has taken the position that the judge may be involved in discussions either after the agreement is reached or to help elicit facts and an agreement. Enker, Perspectives on Plea Bargaining, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 108, 117-118 (1967).

The amendment makes clear that the judge should not participate in plea discussions leading to a plea agreement. It is contemplated that the judge may participate in such discussions as may occur when the plea agreement is disclosed in

> open court. This is the position of the recently adopted Illinois Supreme Court Rule 402(d)(1) (1970), Ill.Rev.Stat.1973, ch. 110A, § 402(d)(1). As to what may constitute 'participation,' contrast People v. Earegood, 12 Mich.App. 256, 268-269, 162 N.W.2d 802, 809-810 (1968), with Kruse v. State, 47 Wis.2d 460, 177 N.W.2d 322 (1970)."

The due process implication is no less significant simply because the issue arose in the state court system.

Moreover, the constitutional violation is exacerbated by the failure to secure the petitioner's presence at this critical in-chambers discussion.

The right to be present at all critical stages of the proceedings is not a matter of form—it is a matter of substance that goes to the very core of our system for the administration of criminal justice. As the late Mr. Justice Black stated for the Court in *Illinois v. Allen,* 397 U.S. 337, 338, 90 S.Ct. 1057 (1970):

> "One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."

Indeed, this Court has reflected upon the right to be present as "a leading principle that pervades the entire law of criminal procedure." *Lewis v. United States,* 146 U.S. 370, 372, 13 S.Ct. 136 (1892) and has commented upon the "peculiar sacredness of this high constitutional right." *Lewis v. United States,* 146 U.S. at 375; *Diaz v. United States,* 223 U.S. 442 (1914).

The underpinning of the rule is clear. The *raison d'être* rests in part on the notion that procedural

due process requires not only actual justice but also the appearance of justice. Society has a stake in the outcome. As put in *Hopt v. Utah,* 110 U.S. 574, 579, 45 S.Ct. 202 (1884), "[t]he public has an interest in [the defendant's] life and liberty. Neither can be lawfully taken except in the mode prescribed by law." The right to be present ". . . also rests upon society's interests in due process." *Bustamente v. Eyman,* 456 F.2d 269, 274 (9th Cir. 1972). See also, *United States v. Gregorio,* 497 F.2d 1253 (4th Cir. 1974), cert. denied, 419 U.S. 1024.

In the instant case, we do not suggest improper motive by the trial court. Nevertheless, to the layman, there is necessarily the appearance of impropriety. The appearance of justice is not best served when a defendant first learns during the appellate process that prior to the jury trial his attorney had effectively admitted his guilt to the court and that the court had received critical accusations of guilt without affording the opportunity to cross-examine.

In our view, it cannot legitimately be argued that the defendant's presence was not required at the in-chambers hearing which so patently affected his interests. Although it is axiomatic that the Constitution does not guarantee "the privilege of presence when presence would be useless, or the benefit but a shadow," (*Snyder v. Massachusetts,* 291 U.S. 97, 106-107 (1934)), nevertheless, the converse of that precept has equivalent constitutional validity.

This was not an in-chambers discussion of law, where the defendant's presence would be meaningless. This was an in-chambers discussion of the facts, including critical questions of the defendant's guilt or innocence.

Assuredly, a defendant has a keen interest—indeed one embodied within both the state and federal Constitutions and legislation—to be present at such a critical moment.

Nor can it be successfully maintained that petitioner waived his right to be present. There was certainly not a knowing waiver of presence, nor was there an affirmative waiver of presence. *Wade v. United States,* 411 F.2d 1046 (D.C. Cir. 1971); *Johnson v. Zerbst,* 304 U.S. 468 (1938); *Cross v. United States,* 325 F.2d 629 (D.C. Cir. 1963); *Evans v. United States,* 284 F.2d 393 (6th Cir. 1960); *Schor v. United States,* 418 F.2d 26 (2d Cir. 1969).

Similarly, the state cannot properly escape reversal by arguing that petitioner did not suffer prejudice by the conduct of the court, the prosecutor and his attorney. We submit that the conduct of those present at the in-chambers conference amounted to such a serious appearance of impropriety that it attained due process proportions. There exist "some constitutional rights so basic to a fair trial that their infraction can never be harmless error." *Chapman v. California,* 386 U.S. 18, 23 (1967). Just as the accused's right to be present during the empanelment of the jury is such a right, *United States v. Crutcher,* 405 F.2d 239 (2d Cir. 1968), cert. denied 394 U.S. 908, so, too, is the right to be present at the critical moments involved here.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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FLAX AND ROSENFIELD,
Of Counsel.

APPENDIX A.

Opinion of the Court of Appeal.

Court of Appeal, Fourth District, Second Division, State of California.

The People of the State of California, Plaintiff and Respondent, v. Richard Timothy Workman and William Allen Cole, Defendants and Appellants. 4 Crim. 9412, (Super.Ct.No.C-36690).

Filed: May 8, 1978.

APPEAL from the Superior Court of Orange County. Claude M. Owens, Judge. Modified and affirmed.

Flax and Rosenfield by Richard L. Rosenfield for Defendant and Appellant Workman.

Paul Halvonik, State Public Defender, and F. Elaine Easley, Deputy State Public Defender, for Defendant and Appellant Cole.

Evelle J. Younger, Attorney General, and Keith I. Motley, Deputy Attorney General, for Plaintiff and Respondent.

Defendants were found guilty by a jury of eight counts of transactions involving fictitious cashier's checks. Count I was conspiracy. Counts II, III, IV were forgery. Counts VII and VIII were grand theft.

The prosecution involved four fictitious cashier's checks. One for $24,500 was purportedly issued by the Bank of Tokyo. Three, in the amounts of $19,370, $38,650 and $9,379, were purportedly issued by the Bank of Finance. Strangely, each bore the same number. Counterfeiters had used that number in the issuance of approximately 20 bogus checks.

Workman was the manager for County [sic] Cadillac. Cole had a used car business next door. The above

fictitious checks were deposited by them and withdrawals made against the account. This in brief constituted the facts on which the prosecution was based.

Defendants claim they were the victims of a counterfeit check scheme. They contended that they needed flooring money and that Emmet Moore and Van Douver offered to provide that flooring.[1] Moore had been a former lot boy for Cole. According to the defendants, Moore and Van Douver delivered the cashier's checks as part of a flooring plan by which Moore and Van Douver were to provide financing in the neighborhood of $100,000 to $150,000. No record was kept of any of these transactions. Not surprisingly, the jury declined to accept the defendants' stories and they were convicted.

On appeal, defendant Cole contends:

(1) That a taped conversation between Van Douver and Cole was improperly received into evidence because it violated his constitutional right to the assistance of counsel.

To this contention there are two answers:

(a) Lack of a suitable objection. Actually, it would appear that any objection was withdrawn. (See RT pp. 84, 101 and 284.) Thus, we have nothing to review.

(b) The statement was made before the institution of any criminal charges, therefore, he had no right

[1]An interesting sidelight to this case is the insight it gives us into the wonders of the used car business. Apparently used car operators cannot get bank flooring. Therefore, they go to private lenders who get 10 percent up front, plus 1½ percent per month. This will probably explain the reason that many used car salesmen have been known to cut a few corners. Barely staying alive under an interest burden such as that is quite a task.

to have counsel present during the questioning. (*People v. Duck Wong*, 18 Cal.3d 178.)

(2) That Penal Code section 654 precludes the imposition of multiple sentences for forgery and grand theft. Acts of forgery are separate and divisible acts. Therefore, the concurrent sentences for these acts are proper. However, the concurrent sentences for the two grand theft counts are improper since these charges evolved from the funds obtained as the result of the forgeries. Thus, the sentence on each count of grand theft will be ordered stayed, the stay to become effective upon successful completion of the sentence for the forgery at which time the stay will become permanent.

Defendant Workman contends:

(1) A violation of Penal Code § 1204.5.

Prior to jury selection, counsel for all parties met with the judge in an effort to negotiate a plea. Additional charges were pending in other jurisdictions which were discussed by all. There were discussions between counsel for each defendant and the court as to the position of each defendant vis-a-vis the other. Defendant now complains of a violation of Penal Code § 1204.5. Since he did not give his consent in open court to the court receiving any such information, admittedly, there was a violation of this section. However, it is rather obvious that the defendant suffered no prejudice from it. Actually, his counsel insisted on the discussions. The court warned against saying anything that "might make a problem."

The information was basically that which any court could have become aware of on application for bail. (The section recognizes the realities of this situation.) In addition, this trial court was aware of three prior

felonies which were alleged. We cannot find by the remotest stretch of the imagination that these discussions with the trial court resulted in any prejudice to the defendant or any miscarriage of justice.[1] In no way was the defendant's right to defend himself impaired. He was harmed in no way during his jury trial during these pretrial discussions. To call this technical error a miscarriage of justice would be a classic elevation of form over substance. To put the matter in proper perspective, it is not reasonably probable that a result more favorable to the defendant would have been reached in the absence of that technical error. (Cal. Const., art. VI, § 13.)

(2) Alleged prosecutorial misconduct.

(a) The district attorney commented on the failure of the defendant to call an attorney as a witness. Counsel for the defendant then responded by saying that the People should have called him. The district attorney returned with an observation that she was precluded from doing so because of the attorney-client relationship. She was wrong, but the matter is trifling. There was no deceptive or reprehensible method. There was no prejudice to the defendant.

(b) That the district attorney injected her personal opinions. This has to do with comments of the district attorney in regard to the evidence. In her argument, the district attorney said, "If a certain witness got on the stand in a trial in which he was participating and lied, or I had reason to believe they were lying

[1]For example, this might have been a retrial in which the trial judge knew practically everything about the defendant. We must place some faith in the integrity and self-discipline of trial courts. This is not to say that Penal Code § 1204.5 is meaningless. However, a violation of that section is hardly an error of constitutional proportions. It is simple *Watson* error.

I would come as close as my personality permits to becoming unglued." This probably slips over the edge into an impermissible reference to the personal opinion of the district attorney as to the evidence and under the strict limitations under which prosecutors operate, this can be classified as an impropriety. However, under no circumstances can it be called deceptive or reprehensible. It actually is trifling and could not have possibly contributed to the verdict. In view of the overwhelming evidence of guilt, it is not reasonably probable that a result more favorable to the defendant would have occurred in the absence of any of the comments of the district attorney concerning which the defendant complains.

(3) That the admission of the taped conversations between Cole and Van Douver was erroneous insofar as this defendant was concerned.

However, there was no objection by Workman. The tape was limited to the case against Cole and the court properly instructed the jury as to that limitation.

(4) A *Miranda* violation.

The first statement complained of was made during noncustodial interrogation in a bank. There was no objection made and we can understand why.

The second conversation was had in a police department. However, this was also noncustodial. Defendant went there voluntarily. He was not in custody and was free to leave. Actually, at this stage, the defendant may have been a suspected victim rather than a suspected criminal. Additionally, there was, understandably, no objection and we have nothing to review.

(5) Inadequacies of representation.

This basically has to do with the failure of counsel to object to all of the above matters. As we have seen, most of the objections would have been a waste of time. Competency of counsel is not judged by the number of objections which are made. A good trial attorney is niggardly with his objections as he can possibly be. In no way was the defense in this case reduced to a farce or a sham, nor was there any withholding of any crucial defense.

The evidence in this case against the defendants was overwhelming. They received excellent representation at the trial level. They have received excellent representation at the appellate level. The trial judge was meticulous in seeing to it that their rights were protected. With one possible small exception, the district attorney behaved herself admirably. The defendants received a fair trial.

Judgment affirmed.

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

/s/ Gardner, *P. J.*

We concur:

/s/ Kaufman, *J.*
/s/ Morris, *J.*

APPENDIX B.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

July 5, 1978

I have this day filed Order hearing denied.
In re: 4 Crim. No. 9412. People vs. Workman.

Respectfully,
G. E. Bishel
Clerk

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of August, A.D. 1978.

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